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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 No. 473

The United Gas Improvement Company,
Petitioner,

Philadelphia Electric Company,
Petitioner,

v.

Federal Power Commission,
Respondent,

Pan American Petroleum Corporation, Atlantic Refining Company, Cities Service Production Company, Humble Oil & Refining Company, Ohio Oil Company, Oil Participations Incorporated, Tidewater Oil Company, Transcontinental Gas Pipe Line Corporation, Continental Oil Company, Magnolia Petroleum Company, Pure Oil Company, Sun Oil Company, Union Oil Company of California, W. H. Hunt, Trustee for Hassie Hunt Trust, Phillips Petroleum Company,
Intervenor-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. James MacIntosh,
J. David Mann, Jr.,
J. Louis Monarch,
John E. Holtzinger, Jr.,
Philadelphia-Washington.
Attorneys for The United Gas Improvement Company.

Vincent P. McDevitt,
Samuel Graff Miller,
Robert P. Garbarino,
1000 Chestnut Street,
Philadelphia 5, Pennsylvania.
Attorneys for Philadelphia Electric Company.

Press of Allen, Lane & Scott, Philadelphia

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OCTOBER TERM, 1959. No.

The United Gas Improvement Company,
Petitioner,
Philadelphia Electric Company,
Petitioner,
v.
Federal Power Commission, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The United Gas Improvement Company and Philadelphia Electric Company pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled cause.

OPINIONS BELOW.

The Opinion of the Court of Appeals (App. A, *infra*, pp. 19-25) is not yet reported. The opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1959 (App. A, *infra*, p. 26). An order denying rehearing was entered on September 9, 1959 (App. A, *infra*, p. 27). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1952) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U. S. C. § 717r(b) (1958 ed.).

QUESTIONS PRESENTED.

1. Whether the requirement for "a most careful scrutiny and responsible reaction to initial price proposals of producers"* was satisfied in a certificate proceeding under Section 7 of the Natural Gas Act, in which the Federal Power Commission required no justification of the producers' initial prices but relied instead on the purchases having been made at "arms length," at the top of current unregulated market prices, by a pipeline which needed the gas for purposes of its own expansion and passed on the increased costs by raising its rates?

2. Whether the Commission's authority to issue conditioned certificates is circumscribed by its ability to determine, in the certificate proceeding, the reasonableness of a conditioned rate?

3. Whether a determination made by the Commission that producer certificates should issue without condition before enunciation by this Court of the requirement set forth in 1, above, necessitated reconsideration by the Commission in the light of that decision, or whether the Court below could itself make the reconsideration?

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* *Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York*, 360 U. S. 378, 391 (1959), hereinafter referred to as the CATCO decision.

STATUTES INVOLVED.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U. S. C. §§ 717-717w (1958 ed.), are set out in Appendix B, *infra*, pp. 28-34.

STATEMENT.

This case involves a decision of the Federal Power Commission pursuant to jurisdiction conferred upon it by Section 7 of the Natural Gas Act, which was affirmed by the United States Court of Appeals for the Third Circuit, pursuant to jurisdiction vested in it by the review provisions of Section 19(b) of that Act.

By 38 applications filed with the Federal Power Commission in the latter part of 1957 and early 1958, 26 producers of natural gas, including several of the largest companies in the oil and gas industry, sought certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act, authorizing sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco) from various fields in southern Louisiana and off-shore in the Gulf of Mexico. The contracts were entered into after Commission certification of the CATCO sales. The initial prices proposed by the producers and allowed by the Commission ranged from 22.4 to 23.3 cents per Mcf, including in each instance a Louisiana tax of 1.3 cents per Mcf. Reserves of approximately two trillion cubic feet (2,000,000,000 Mcf) of natural gas were committed by these sales to be delivered under long-term contracts over a period of some 20 years.

Transco, the purchaser of this gas, owns and operates a natural gas pipeline system extending from oil and gas fields in the Southwest to the Eastern Seaboard, supplying such large metropolitan areas as Philadelphia, Newark,

and New York City. This gas was purchased by Transco to support the largest pipeline expansion program it had ever proposed, costing some $167 million and involving the construction of some 556 miles of pipeline transmission facilities and 345 miles of gas supply laterals. Because this gas was priced substantially (80%) above Transco's average cost of purchased gas (13.97¢, R. 4) and some 6¢ above the price previously paid by it in this area (17¢ per Mcf, R. 9), and because payment of such price would trigger "favored-nation" pricing clauses in other of Transco's gas purchase contracts ($5,000,000 annually, R. 6-7, 124-125), certification at the field price level proposed would necessitate the filing of a pipeline rate increase (R. 282-287).

Philadelphia Gas Works Division of The United Gas Improvement Company (UGI or Petitioner) operates the municipally-owned gas works of the City of Philadelphia, serving a 750-Btu mixed gas to nearly 600,000 customers. Philadelphia Electric Company (Philadelphia Electric or Petitioner) serves a 900-Btu mixed gas to over 200,000 customers in the counties contiguous to Philadelphia. Prior to the instant proceedings, UGI's Philadelphia Gas Works Division was authorized to receive on a firm basis about 51,000 Mcf per day or one-third of its total natural gas supply from Transco; Philadelphia Electric was authorized to receive from Transco somewhat less than half of its total supply or about 40,000 Mcf per day on a firm basis. In this expansion program, UGI sought (and was granted) authorization to purchase an additional 12,500 Mcf of natural gas service per day plus 5,000 Mcf per day of storage gas from Transco. Philadelphia Electric similarly proposed (and was authorized) to purchase 10,000 Mcf per day firm and 20,000 Mcf per day storage. Accordingly, these Petitioners intervened in both the pipeline and producer dockets before the Commission to support their request for gas service and, in the light of the high initial prices and their direct

impact on Transco's costs and rates, to assure that all gas would be supplied at reasonable rates." (R. 305-308, 310-313.)

Separate hearings were ordered by the Commission in the producer and the pipeline proceedings. However, the same hearing examiner presided in both. In the producer dockets the only evidence introduced by the applicants was that the initial prices proposed were negotiated in arms-length bargaining with Transco. Transco, as an intervenor in support of the producer sales, presented evidence that it needed gas to meet expanded market requirements involved in its pipeline expansion program. No cost, field price, or any other price-justification data were submitted in support of the initial prices, notwithstanding the fact that, prior to hearings, the Commission, acting through its Secretary, had requested the producers to supplement their certificate applications because:

> "Examination of information contained in the Commission's files indicates that this rate is higher than any effective rate now on file covering the field sale of natural gas to a pipeline company for resale in interstate commerce in this area." (R. 314-441, 332-336, 367-371).

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* Because certification of the proposed project, including sales by producers at the initial price proposed, would require a pipeline rate increase by Transco to pass on the increased cost of gas and because the pipeline expansion program allegedly could not be financed unless investors were assured that the increased costs could be passed on, Transco sought and obtained so-called "Memphis" letters from its customer companies, including UGI and Philadelphia Electric (R. 465) to avoid the restrictive effects of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Memphis Light, Gas & Water Division, et al.* v. *FPC*, 250 F. 2d 402 (D. C. Cir., 1957); subsequently reversed *sub nom., United Gas Pipeline Company, et al.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103 (1958). In such letters Transco's customers agreed to the *filing* of a pipeline rate increase, although reserving the right to contest such filing before the Commission, and UGI, in a covering letter, stated its position that the proposed initial producer prices were not justified. The letters further provided that the agreement would terminate if the *Memphis* decision was reversed (as it was) by this Court (R. 282-287).

Further, cross-examination of the producer witnesses revealed that the price was in most cases the highest offered for the gas and that none of the applicants had considered its costs in determining this price (R. 51-109). Transco's witness testified that: (*a*) Transco was presently paying 16¢ per Mcf (plus tax) for gas purchased in Louisiana; (*b*) the price level established first by the CATCO sale and by others subsequent to CATCO had made it impossible to continue to buy gas at this price (R. 116-118); (*c*) it was therefore necessary for Transco to pay the higher prices here proposed (slightly above CATCO) to buy new supplies (R. 118); (*d*) the initial prices proposed would trigger favored-nation clauses in some 36 of Transco's other gas purchase contracts, increasing its costs by some $5 million annually (R. 124) and (*e*) the total effect of the prices proposed, including the triggering, would be to increase its cost of purchased gas by about two cents per Mcf (R. 124). In addition, the Commission's Staff introduced a statistical exhibit of representative rates for other sales in south Louisiana showing that the proposed rates were higher than any of those in effect in this area. (R. 288-303). At the request of the Petitioners, the Presiding Examiner took official notice of all rate schedules covering sales in south Louisiana, which schedules show the spiraling and inflationary effect on prices caused by Commission policy of unquestioning certification of new sales at ever-increasing prices. (R. 192-223, 583). In light of these facts, both the Petitioners, the New York Public Service Commission and the Commission's Staff took the position that the producer applications must be dismissed or a consumer-protecting price condition imposed (R. 417-18).

In his initial decision on the producer applications the Examiner noted that:

> "None of the producer-applicants presented cost or any other data to support its proposed price" (R. 415).

However, he ruled that he was bound by prior Commission decisions (R. 418) and that, under such decisions, there was no evidence which would justify a rate condition (R. 422). He, therefore, concluded that "* * * under the standards [then] prevailing for judgment of this matter, the public convenience and necessity [required] the issuance of these certificates without any price limitations * * *" (R. 423). The Examiner, after hearing,* also concluded that public convenience and necessity required authorization of the proposed pipeline expansion program (R. 427-480).

The Commission heard argument on both proceedings at the same time and consolidated them for decision. In a 2-1 decision (R. 481-556) it affirmed the Examiner's application of its prior decisions in unconditionally authorizing the new producer sales, notwithstanding the complete absence of "cost or any other data" to support the initial prices. The majority held that, while price may be an element in determining public convenience and necessity in a producer certificate case, it is only one factor, the importance of which may be materially lessened by the presence of other factors (R. 488). It therefore concluded that, "in relation to all the facts, the prospective price increase to Transco's customers as a result of these prices does not establish an adverse effect justifying rate conditions" (R. 489). The majority also expressed doubt as to the extent of its power to alter or vary an initial contract price (R. 491) and explained that in any event it would not

> "* * * act as a kind of peace-time OPA for the natural-gas producing industry and under the narrow 'conditions' provisions of the certificate section of the Act and outside the rate provisions thereof, under-

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* The pipeline hearings were held prior to the hearings on the producer certificate applications. None of the producers participated in these hearings. Transco introduced among other things, the so-called "Memphis" letters in support of the financial feasibility of its pipeline project. Transco's customers, including Petitioners, introduced testimony indicating a need for natural gas and that such gas would be less expensive than manufactured gas. The impact of the proposed initial prices on Transco's costs and rates also was clearly shown (R. 3-7, 18).

take to prevent all price increases and force back the price level for all initial producer sales on the basis of a price-ceiling type of regulation * * *" (R. 493).

The majority opinion was written by Commissioner Hussey, with Chairman Kuykendall concurring in the result, (R. 524) adhering to views previously expressed by him to the effect that the Commission lacked power to impose an initial price condition. (See *Seaboard Oil Company*, 19 FPC 416 (1958).) Rehearing was denied on October 31, 1958, by a majority of 4 to 1, with Commissioner Connole dissenting (R. 602).

Petitioners and the New York Public Service Commission sought and were granted review in the Court below. Their petitions were briefed and argued before the decision of this Court in CATCO. Subsequent to such decision, however, all parties except the respondent Commission filed short supplemental briefs concerning its impact on this case. Although the Commission did not respond to this Court's decision in CATCO, the Court below affirmed the Commission's decision concluding, after an independent appraisal of the administrative record, that the result reached was permissible under CATCO. Judge Hastie dissented on the ground that the proceedings should have been remanded to the Commission for reconsideration in the light of this Court's opinion in CATCO (App. A, *infra* p. 25).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW OVERLOOKS THE BASIC REQUIREMENT, SPELLED OUT BY THIS COURT IN ITS CATCO OPINION, THAT, IN SECTION 7 PROCEEDINGS, INITIAL PRICE PROPOSALS OF PRODUCERS MUST BE JUSTIFIED; IT REOPENS A MAJOR GAP IN RATE REGULATION UNDER THE ACT.

Petitioners respectfully submit that this case should be reviewed because the Court below misinterpreted and

misapplied this Court's recent CATCO decision with the result that the Federal Power Commission, rather than applying the Act in such way as to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges",* has construed the decision below† as *carte-blanche* approval of its *pre*-CATCO practice of granting producer certificates without "a most careful scrutiny and responsible reaction to initial price proposals of producers".‡

The Court below acknowledged that the CATCO decision "emphasizes strongly that attention must be given the price factor" but the only attention it gave to this question was to determine whether the *respondent pipeline* had contracted to pay prices which were not out of line with the "market".

Noting the evidence of "need" for gas by the public served by Transco (App. A, *infra*, p. 21) and pointing out that the prices Transco agreed to pay the producer suppliers were at the "market" price level established by the CATCO sales, (App. A, *infra*, p. 23) the Court apparently concluded that, where these factors are present, the Commission need not make further inquiry into the justification of the initial price proposals of producers before authorizing them to make such new sales. Petitioners submit that neither (1) the presence of need for more gas by a pipeline purchaser, and its utility customers, nor (2) the fact that the prices proposed by producers are no higher than other "market" prices satisfies the requirement spelled out in CATCO, that the producers' initial price proposals in Section 7 proceedings must be justified.

"Need" for additional supplies obviously does not dispense with the requirement that producer prices be justified. Indeed the need of the pipeline and its utility customers for more gas to expand their markets is not at issue here. What is in issue is whether the existence

* 360 U. S. at 388.

† See cases cited, *infra*, p. 10, n. 2.

‡ 360 U. S. at 391.

of this *pipeline* need has led to an excessive *producer* price. This question cannot be determined by directing the inquiry to the purchaser's needs. The greater the need the greater is the opportunity for consumer price exploitation, which the Natural Gas Act is intended to prevent. The necessitous pipeline purchaser can be indifferent to price because it must have the gas to further its own economic interests and can pass on, by rate filings, increased costs to the consumer.

The "market prices" used here as a criterion provide no assurance that the consumer will not be exploited, because these prices are unregulated and have never been scrutinized by the Federal Power Commission.* Indeed, in this case the "market" prices in this area are based on the CATCO floor price (see 360 U. S. at 390, and R. 116-118), which this Court found had not been supported and *which has not yet been reconsidered by the Commission on an adequate record.* Until it is demonstrated that the "market prices" are themselves reasonable, they are meaningless as a touchstone. But, the Court below followed the lead of the Commission and completely overlooked the fact that the crucial question, *i. e.*, whether the *producer sellers'* asking price is justified, is a problem distinct from the subsidiary question whether the *pipeline-purchaser* used its best efforts to secure a reasonable price. As a result, it approved certification of initial prices in this case which were even higher than those which this Court found had not been sustained in CATCO.

Accordingly, the importance in the administration of the Natural Gas Act of the questions presented in *Oklahoma Natural*† and CATCO, and which justified the inter-

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* This is the result of the "nigh interminable" delay in producer rate proceedings before the Commission, which this Court pointed out in CATCO.

† *Oklahoma Natural Gas Company* v. *FPC*, 257 F. 2d 634 (D. C. Cir. 1958), cert. granted, 358 U. S. 877 (1958); cert. dismissed on petitioner's motion pursuant to Rule 60, 358 U. S. 948 (1959).

vention of this Court in those cases, requires a prompt correction of the misinterpretation of the CATCO decision by the Court below. Unless this Court acts now to reinstate the requirement that *producer* price proposals be justified, the weakening of the CATCO decision by the Court below will be accepted as a permissible result and will continue to be used by the Commission to justify its failure to prescribe protective rate conditions. Thus, the unsound principle will be established that, where there is a "need" for gas, arms-length bargaining is sufficient price justification, despite the fact that, where the *pipeline purchaser* passes on the cost, evidence of arms-length bargaining is no assurance whatever that the *producer seller's* price demands are reasonable. Price regulation was established to insure fair treatment of the consumer. This purpose will be frustrated if price justification begins with the pipeline and ignores the critical requirement that the producer's price for interstate sales must be justified before there can be any effective regulation of subsequent pipeline sales. *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672 (1954).

Such price justification does not require a full-scale producer rate determination in a Section 7 proceeding. It does, however, contemplate a factual showing that the producer's asking price reflects its actual economic needs and does not simply represent what the market will bear. (See Footnote 10 of the Examiner's Decision, R. 419.) Such a showing is particularly important at this stage of producer regulation (*a*) "because the delay incident to determination in 7 (c) proceedings through which initial certificated rates are reviewable appears nigh interminable," 360 U. S. at 389, and (*b*) because it is readily apparent from Commission decisions subsequent to the decision of the Court below, that the misinterpretation of the CATCO opinion by that Court has been immediately relied upon by the Commission as a confirmation of its pre-CATCO practice.

In a series of decisions issued less than a week after the decision of the Court below, and relying on that decision, the Commission certificated new sales of gas from southern and off-shore Louisiana, which is the area of the CATCO sales and the sales in the instant case, at prices in excess of the price involved in CATCO, without any record support of such prices other than arms-length bargaining and pipeline need for additional gas supplies. *The California Company*, Docket No. G-16108, *et al.*, August 10, 1959; *Sun Oil Company, et al.*, Docket Nos. G-15122, *et al.*, August 10, 1959; *Sunray Mid-Continent Oil Company*, Docket No. G-14753, August 10, 1959; *Superior Oil Company, et al.*, Docket No. G-16380, *et al.*, August 10, 1959; *Texas Gas Transmission Corp., et al.*, Docket No. G-17335, *et al.*, Opinion No. 327, issued August 10, 1959; *South Georgia Natural Gas Company, et al.*, Opinion No. 325, issued August 7, 1959.

In only one post-CATCO case, involving construction of a new pipeline to California, has the Commission imposed price conditions in authorizing new sales by producers. In that case the sales were not from the major Louisiana or Texas Gulf Coast shopping areas which are the main source of new interstate gas supplies. The initial producer prices were far in excess of the highest prices presently paid in the area and the conditions imposed simply reduced the initial prices proposed to the highest level in effect at the time of this Court's CATCO decision. *Transwestern Pipeline Co., et al.*, Docket Nos. G-14871, *et al.*, Opinion No. 328, August 10, 1959, rehearing granted September 23, 1959.

If the decision below is allowed to stand the opinions cited above show that the remand ordered by this Court in CATCO can only result in nothing but a reaffirmation of

This decision is not final since the Commission has granted rehearing to the producer-applicants to introduce further evidence in support of the initial prices

the original order of the Commission. The normal result will be further appellate proceedings and another resort to this Court. The grant of a writ of certiorari in this case will finally settle whether producer price justification must begin with and relate directly to the producer or whether it may properly begin with the pipeline purchaser. If this Court will now remove the uncertainty with which the Court below has shrouded the CATCO decision, it will avoid circuity, contribute to the orderly administration of the Natural Gas Act and secure prompt consumer protection from probable excessive prices.

II.

The Decision Below Leaves Unanswered a Question of Pressing Importance, Namely the Scope of the Commission's Authority to Impose Conditions.

It is clear from the CATCO decision that the Commission may, in its discretion, issue a certificate which will leave open for future consideration the precise price which is just and reasonable. The Commission declined to so condition the certificate in this case because of the asserted absence of evidence to show that the producer prices proposed are unreasonable, its inability to determine what rate condition to impose and the purported impracticability within the confines of a certificate proceeding of determining just and reasonable rates for initial sales of producers (R. 489).

Thus it is clear that the Commission required a showing of unreasonableness, and also shifted to proponents of the condition the burden which should be on the producer, of establishing that a price proposal is reasonable. Furthermore, the Commission failed to realize the existence of the middle course, subsequently pointed out in the CATCO decision, between a full-scale inquiry and no inquiry at all. The Commission resolved all doubts by imposing no conditions whatever.

Until there is a proper understanding of the scope and extent of the Commission's authority to issue condi-

tioned certificates, past practice indicates that the statutory scheme for holding the line will not be effectively exercised, but rather will fall into disuse. The recent decision in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission* (10th Cir., September 1, 1959) adds to the confusion. It disapproved a conditioned certificate as being too indefinite.

Although this question was raised, the Court below did not consider it and there is a clear need for the intervention of this Court to guide the Commission whether, and to what extent, its authority to impose conditions is limited.

III

A Significant Departure from Accepted Practice in the Field of Administrative Law Is Involved in the Failure of the Court Below to Remand the Instant Proceedings to the Commission for Reappraisal in Light of This Court's CATCO Decision.

As pointed out in the dissenting opinion below, the CATCO decision required a fresh consideration of this case in the light of this Court's clear admonition concerning the duty of the Commission with respect to producer price proposals. When the Commission granted these certificates, its authority to attach conditions changing initial rates was unsettled (R. 491-2). In fact, one member of the two-man majority in the Commission decision grounded his concurring opinion on a belief that the Commission did not have the power to impose such rate conditions (R. 524; see *Seaboard Oil Company*, 19 FPC 446, 426 (1958)).

The relationship between the "just and reasonable" rate standards of the Act and its certificate provisions was uncertain. On the one hand it was contended that a certificate proceeding under Section 7 does not involve the question of just and reasonable rates, while at the

other extreme it was contended that, when the initial rate is challenged, the Commission could not grant a certificate in the absence of a finding that the rate was just and reasonable. *Oklahoma Natural Gas Company* v. *FPC*, *supra*, p. 10.

In the CATCO case this Court set at rest the doubt concerning Commission authority to attach conditions and pointed out that, although a full-scale rate hearing is not necessary in Section 7 proceedings, there is a middle course between a full inquiry and no inquiry which the Commission must follow, namely, "a most careful scrutiny and responsible reaction to initial price proposals of producers under Section 7" (360 U. S. at 391).

That the Commission did not follow such a middle course is apparent from the fact that it held in this case (*a*) that the applicants had satisfied their burden of showing that the proposals were required by the present or future public convenience and necessity, when they had introduced evidence (1) that a market exists for the sales at the price proposed and (2) the projects are "economically feasible", and (*b*) that permanent certificates should then issue unless the Staff or intervenors introduced evidence that such prices were unreasonable and adversely affected the public interest (R. 484-6). Obviously, this applied a completely different standard from that outlined in this Court's CATCO Opinion, in determining whether the rate level is in the public interest (360 U. S. at 392-3). Further, this Court in CATCO declared that price, while not the only consideration, was a "consideration of prime importance" in determining whether permanent certificates should issue (360 U. S. at 391); the Commission on the other hand held in this case that price is but one element, the importance of which may be materially lessened by other elements involved in the case (R. 488).

Thus, this Court's CATCO decision required the Commission to give greater attention to initial price proposals

than it had originally deemed necessary and emphasized considerations which might well have led the Commission to a different result in this case. Hence, orderly administrative procedure required a remand to the Commission. However, the Court below, over the protest of the dissenting judge, mistakenly chose to substitute its judgment for that of the Commission and concluded that, after considering the impact of the CATCO decision, the Commission would come to the same decision as before. Accordingly, it affirmed without a remand.

Since the Commission, upon a remand, would have exercised an essentially administrative function, the Court below had no authority itself to make the decision. Further, it is a fundamental principle of administrative law that a reviewing court, when appraising a judgment which an administrative agency is authorized to make, must judge the propriety of such action solely by the reasoning and grounds invoked by the agency. If such prove to be inadequate or are erroneous, the Court is powerless to affirm the administrative action even though the same result could, in its opinion, have been reached if the agency had correctly apprehended and properly applied the law. (*SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947); *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 534-5 (1945); *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U. S. 944 (1957); *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952); *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U. S. 626, 634 (1945); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145-6 (1940).)

This significant departure from accepted practice has occurred in a case of more than routine importance. This case represents such an immediate and erroneous application of the CATCO decision that, unless promptly corrected by this Court, the practically contemporaneous views of the Court below will be read as a gloss on the CATCO decision and as a permissible interpretation of

this Court's construction of the statutory duty of the Commission in this field (see cases cited, *supra*, p. 12).

CONCLUSION.

For all the foregoing reasons, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

W. JAMES MACINTOSH,
J. DAVID MANN, JR.,
J. LOUIS MONARCH,
JOHN E. HOLTZINGER, JR.,
Philadelphia-Washington

Attorneys for The United Gas Improvement Company.

VINCENT P. McDEVITT,
SAMUEL GRAFF MILLER,
ROBERT P. GARBARINO,
1000 Chestnut Street,
Philadelphia 5, Pennsylvania

Attorneys for Philadelphia Electric Company.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,797 and 12,805

The United Gas Improvement Company,
Philadelphia Electric Company,
Petitioners in No. 12,797

Public Service Commission of the State of New York,
Petitioner in No. 12,805

v.

Federal Power Commission,
Respondent

Pan American Petroleum Corporation,
Atlantic Refining Company,
Cities Service Production Company,
Humble Oil & Refining Company,
Ohio Oil Company,
Oil Participations Incorporated,
Tidewater Oil Company,
Transcontinental Gas Pipe Line Corporation,
Continental Oil Company,
Magnolia Petroleum Company,
Pure Oil Company,
Sun Oil Company,
Union Oil Company of California,
W. H. Hunt, Trustee for Hassie Hunt Trust,
Phillips Petroleum Company,
Intervenors

On Petitions for Review of Decision and Order of the Federal Power Commission.

Argued June 5, 1959

Before Goodrich, Kalodner and Hastie, *Circuit Judges*.

OPINION OF THE COURT

(Filed August 4, 1959)

By Goodrich, *Circuit Judge*.

These cases are two petitions seeking review of action of the Federal Power Commission. They present the same questions and attack the same order.[1] They have been argued together and will be disposed of in one opinion.

The Federal Power Commission has granted permanent certificates of convenience and necessity to twenty-six gas producers, involving thirty-eight applications, who have made contracts for the sale of gas produced in southern Louisiana and offshore areas to Transcontinental Gas Pipe Line Corporation (Transco) for transportation and resale in interstate commerce. The Commission also granted permanent certificates of public convenience and necessity to Transco to construct additional pipe line facilities to carry the supply of natural gas authorized by the producers' certificates.

The matters before the Commission involving this large transaction covered many items. There were contracts for the sale of gas by the producers. There were incidental and for our purposes here unimportant provisions concerning arrangements with buyers from Transco's pipe line. There was an elaborately worked out and thoroughly considered plan for the storage of gas in underground reservoirs in western Pennsylvania. There was a

[1] The opinion and order are contained in Federal Power Commission Opinion No. 315, issued September 4, 1958.

proposal by Transco for a huge increase in pipe line facilities to serve the New York and Philadelphia areas. Transco's capital expenditure is about $167,000,000.

While the factual background is wide the subject litigated in this review becomes a narrow one. Transco's customers called for more gas than Transco was able from its then sources to supply. Transco negotiated arms-length contracts with these twenty-six producers. There is no suggestion that there was any collusion in the formation of these contracts. They call for prices ranging from 22.4 cents to 23.3 cents per Mcf of gas.

It is the contention of the petitioners that the Commission abused its discretion in not attaching to the producers' certificates conditions limiting the price to be paid by Transco to a level below that set in the contracts.[2] It is pointed out by them that the price of natural gas obtained from the area here concerned has been increasing rapidly. These last certificates of convenience and necessity which approve this scale of prices will cause another general rise in gas prices, it is argued, and thus produce another loop in the rising spiral.

This is really the only point in the case, when all the argument is made: Was it an abuse of discretion for the Commission to grant these certificates without conditioning them as to price? We have said in the *Signal* case[3] that the Commission could make its certificate conditioned upon a price limitation.[4] We did not say that it must.

[2] Petitioners in No. 12,797, United Gas Improvement Company and Philadelphia Electric Company, attack only the granting of the unconditional certificates to the producer applicants. Petitioner in No. 12,805, Public Service Commission of the State of New York, urges additionally that Transco's certification for the construction of additional pipe line facilities is unlawful since it is dependent on the issuance of certificates to the producers.

[3] Signal Oil and Gas Co. *v.* Federal Power Comm'n, 238 F.2d 771 (1956), *cert. denied*, 353 U.S. 923 (1957).

[4] "... The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 56 STAT. 84 (1942), 15 U.S.C.A. § 717f(e) (1948).

Since the case was submitted to this Court the Supreme Court has affirmed us in a case referred to by the parties as "Atco".[5] We proceed in this case, therefore, with the text of the Supreme Court opinion before us. The Court affirmed the Third Circuit in sending that case back to the Commission for further hearing. The grounds upon which the majority[6] rested its decision differed from those relied on by this Court and we shall, of course, keep our eye on the Supreme Court opinion rather than our own.

The Supreme Court pointed out that there had been no showing that "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.'" — U. S. at —. That there is a large and immediate need for more gas in the territory served by Transco was fully developed in the testimony and made the subject of findings by the Commission.

Transco presented testimony at the producers' hearing that it would be unable to meet the estimated average day and peak day requirements of its customers from existing gas supplies. According to the evidence, without increasing its supply Transco would experience annual deficiencies of 8,162,000,000 cubic feet in 1959, 24,899,000,000 cubic feet in 1960 and 23,081,000,000 in 1961. Converted to average daily volumes, these deficiencies would amount to 22,400,000 cubic feet in 1959, 68,200,000 cubic feet in 1960 and 63,200,000 in 1961.[7] Inclusion of the gas reserves

[5] Atlantic Refining Co. *v.* Pub. Serv. Comm'n, — U.S. — (June 22, 1959), *affirming on other grounds*, Public Service Comm'n of N. Y. *v.* Federal Power Comm'n, 257 F.2d 717 (3d Cir. 1958).

[6] Mr. Justice Harlan, joined by Mr. Justice Frankfurter, concurred on the narrow ground that there was no evidence to support the findings that (1) "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas'" and (2) "there was serious danger that petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms." U.S. at —.

[7] The peak day deficiencies would total 116,800,000 cubic feet in 1959, 159,400,000 cubic feet in 1960 and 171,200,000 in 1961.

which are the subject of these proceedings would mean that Transco need not experience its first annual deficiency until 1971. Apart from the storage field aspect of its certification, Transco will supply an additional 173,634,000 cubic feet daily to its existing customers.

At the Transco hearing prepared testimony by Transco's customers indicated that in 1959 and in the following years substantial deficiencies in the supply of natural gas would exist. In sum, these gas companies, serving local consumers, attested with facts and figures to the increased consumer demand for gas, their inability to satisfy that demand from existing supplies, and the desirability of purchasing increased quantities of natural gas rather than undertaking the more expensive task of expanding facilities and producing manufactured gas.

The Supreme Court opinion emphasizes strongly that attention must be given the price factor in deciding the question of issuance of the convenience and necessity certificate. The Court pointed out that Section 5 of the Natural Gas Act[8] is not a sufficiently adequate protection for the consumer. If the price is too high the consumer will have been paying too much for his gas while the long drawn out proceeding under Section 5 is pending and there is no provision for his getting a refund. 15 U. S. C. A. § 717d (1948). Therefore, the next point necessary to consider is whether the attention given to the subject of price to be paid for the gas was sufficient on the part of the Commission and whether the conclusion it reached was reasonable.

The purchasers' certificates authorize the sale of approximately 2 trillion cubic feet of natural gas to Transco from the southern Louisiana and offshore areas at contract prices ranging from 22.4 to 23.3 cents per Mcf. The contracts do not contain favored-nation or price redetermination clauses.

[8] 52 Stat. 821 (1938), as amended, 15 U.S.C.A. §§ 717-717w (1948), as amended, 15 U.S.C.A. §§ 717(c), 717r (Supp. 1958).

The trial examiner found that these prices "are materially higher than the levels involved in Transco's prior purchases or existing contracts." Transco's highest previous rates were 17 cents per Mcf. However, these new prices do not establish "a new price plateau in the southern Louisiana shopping area."[9] The Catco price was as high as the minimum rates in the Transco contracts. Catco involved the sale of 1.67 trillion cubic feet of gas from the offshore area at an initial rate of 22.4 cents per Mcf. The contracts contained escalation clauses calling for periodic increases in specific amounts.[10] In addition to the Catco agreements there were contracts for sales to Southern Natural Gas Company at 22.8 cents per Mcf and to Texas Eastern Transmission Corporation at 23.9 cents.[11] Two nonjurisdictional, *i.e.*, intrastate, contracts called for delivery of about 100 million cubic feet daily at prices which would reach 25 cents per Mcf by the middle of 1960.

The trial examiner also found that "* * * Transco's purchase of gas at the proposed levels will 'trigger' many of its existing contracts. * * *"[12] The amount of the "triggering" was estimated to be $5,483,000 in 1959, $4,177,000 in 1960 and $5,192,000 in 1961. A Transco witness testified that the total effect of the new contracts, including the "trigger" of existing contracts, on Transco's pur-

[9] Several of the producers testified that negotiations with other pipe line companies had centered around the range of prices ultimately agreed to by Transco. A few stated that they had received firm offers at these prices from other pipe line companies. There can be little doubt that the Transco contract prices actually represent the market price for natural gas in the area.

[10] U.S. at

[11] Comparisons are weak, however, since neither the quantities involved in these sales, nor the terms and conditions of these contracts are part of the record.

[12] Before the "triggered" increases can be passed along to purchasers, the Commission must approve the rates under the standards established in Section 4 of the Act, 15 U.S.C.A. § 717c (1948).

chased gas cost, system-wide, would be an increase in the rank of 2 cents per Mcf.[13] Finally, there was evidence in this case that the increased supply of natural gas would effect cost savings of Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanding consumer demand for gas.

The Supreme Court opinion in Carco stated clearly that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." —U. S. at . It did require "careful scrutiny and responsible reaction to initial price proposals of producers under § 7." *Ibid.* It also recognized that § 7 requires the Commission to "evaluate all factors bearing on the public interest." *Ibid.*

It is the "all factors" aspect which makes these cases so hard to decide. One Commissioner dissented in this case as he has in several proceedings prior. Members of a careful and experienced court divide when the Commission's order comes before them for review. *Oklahoma Natural Gas Co.* v. *Federal Power Comm'n*, 257 F. 2d 634 (D. C. Cir. 1958). See also *Florida Economic Advisory Council* v. *Federal Power Comm'n*, 251 F. 2d 643 (D. C. Cir 1957).

The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.

The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been con

[13] This estimate was made in the producers' hearing. Evidence in the pipe line hearing indicates that Transco's system-wide average cost of gas purchased would increase by 3 cents.

sidered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here.

The order of the Commission will be affirmed.

HASTIE, *Circuit Judge*, dissenting.

The opinion of the court reasons that the result reached by the Federal Power Commission in these cases is a permissible result despite the strictures of the decision rendered by the Supreme Court on June 22, 1957 in *Atlantic Refining Co.* v. *Public Service Commission*, — U. S. —. I am not now prepared to challenge that view. However, before reaching that point it seems appropriate to ask whether the Commission would have proceeded in the way it did and reached the result it reached here, had the subsequent teaching of the *Atlantic Refining* case then been before it.

Certainly the *Atlantic Refining* case indicates an approach and emphasizes considerations which might well have led the Commission to a different result, with or without further inquiry as to reasonable rates, in the cases now before us. To me that conclusion is a sufficient reason for sending these cases back to the Commission for reexamination. I would vacate the orders of the Commission in the present cases and remand with instructions to reconsider in the light of *Atlantic Refining Co.* v. *Public Service Commission*.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,797

The United Gas Improvement Company,
Philadelphia Electric Company,
Petitioners,

v.

Federal Power Commission,
Respondent

Pan American Petroleum Corporation,
Atlantic Refining Company,
Cities Service Production Company,
Humble Oil & Refining Company,
Ohio Oil Company,
Oil Participations Incorporated,
Tidewater Oil Company,
Transcontinental Gas Pipe Line Corporation,
Continental Oil Company,
Magnolia Petroleum Company,
Pure Oil Company,
Sun Oil Company,
Union Oil Company of California,
W. H. Hunt, Trustee for Hassie Hunt Trust,
Phillips Petroleum Company,
Intervenors

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:
HARRIET G. HUMPHREYS,
Chief Deputy Clerk.

August 4, 1959

Received & Filed
Aug. 4, 1959
IRA O. CRESKOFF,
Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,797

The United Gas Improvement Company,
Philadelphia Electric Company,
Petitioners,

v.

Federal Power Commission,
Respondent

SUR PETITION FOR REHEARING

Present: GOODRICH, KALODNER, STALEY and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the above entitled case is hereby denied.

By the Court,
GOODRICH,
Circuit Judge.

Dated:
September 9, 1959

Received & Filed
Sept. 9, 1959.
IRA O. CRESKOFF,
Clerk

APPENDIX B.

The pertinent provisions of the Natural Gas Act of June 21, 1938, 52 Stat. 821 as amended, 15 U.S.C. §§ 717-717w (1958 ed.) are as follows:

SECTION 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

. . . . . .

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and

the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * * * * *

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * *

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such

natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

* * * * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall

be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * * * *

SECTION 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State municipality, or State commission is a

party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based." Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction,

which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

* * * * * * * *